90-4 29(1)

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION,
Petitioner,

v.

BETSY Y. JUSTUS, in her official capacity as Secretary of the North Carolina Department of Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

WHERE THE APPLICABLE PRINCIPAL STATUTE PROVIDES THAT ELECTRIC COOPERATIVES WILL PAY THE SAME TAXES AS INVESTOR-OWNED POWER COMPANIES (INCOME TAXES EXCEPTED), IS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE STATE IMPOSES ITS GROSS RECEIPTS FRANCHISE TAXES ON THE EQUITY CAPITAL FURNISHED TO ELECTRIC COOPERATIVES BY THEIR MEMBER-OWNERS BUT NOT ON THE EQUITY CAPITAL FURNISHED TO INVESTOR-OWNED POWER COMPANIES BY THEIR STOCKHOLDERS?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.1, Four County Electric Membership Corporation ("Four County") states that it has no parent companies, subsidiaries or affiliates.* Four County is an electric cooperative incorporated under the laws of, and operating solely within, North Carolina, serving approximately 21,000 member-owners.

At all times relevant to this case through April 30, 1990, Ms. Helen A. Powers was the Secretary of the North Carolina Department of Revenue; but on May 1, 1990, Ms. Betsy Y. Justus became the successor Secretary. Pursuant to Rule 25 of the Federal Rules of Civil Procedure, Four County brings this Petition for Writ of Certiorari against the current Secretary.

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* Along with 26 other electric membership corporations in North Carolina, it is a member-owner of North Carolina Electric Membership Corporation, which furnishes bulk power supply to its members; of North Carolina Association of Electric Cooperatives, which is the state trade-service organization of the electric cooperatives; of Tarheel Electric Membership Association, which is an equipment and supplies organization of the cooperatives; of National Rural Electric Cooperative Association, which is the Washington, DC-based national trade-service organization of over 900 electric cooperatives in 46 states; and of National Rural Utilities Cooperative Finance Corporation, which is a Washington, DC-based cooperative bank that makes capital loans to over 900 electric cooperatives and their affiliated organizations in 46 states. Four County Electric Membership Corporation has only one membership in these organizations; it controls none of them nor does any of them control it.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	4
STATEMENT OF THE CASE	5
REASONS FOR ALLOWANCE OF THE WRIT	8
WHERE THE APPLICABLE PRINCIPAL STATUTE PROVIDES THAT ELECTRIC COOPERATIVES WILL PAY THE SAME TAXES AS INVESTOR-OWNED POWER COMPANIES (INCOME TAXES EXCEPTED), EITHER THE TAXING STATUTES THEMSELVES OR THEIR ADMINISTRATION AND IMPLEMENTATION ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THEY IMPOSE TAXATION ON THE PATRONAGE EQUITY CAPITAL FURNISHED TO ELECTRIC COOPERATIVES BY THEIR MEMBER-OWNERS BUT NOT ON THE EQUITY CAPITAL FURNISHED TO INVESTOR-OWNED POWER COMPANIES BY THEIR STOCKHOLDERS	9
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) 9
Four County Electric Membership v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989) 3
Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) 9
Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) 14
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986) .. 4
State Board of Tax Comrs. v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931) 9
State v. Pea River Electric Cooperative, 434 So.2d 785 (Ala. Civ. App. 1983) 13
State v. Pea River, No. 81-1591-G (Montgomery County Ct. Aug. 4, 1982) 13
Stewart Dry Goods Company v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054, reh. den. 295 U.S. 768, 55 S.Ct. 652, 79 L.Ed. 1709 (1935) 11,13, 14
Valentine v. Drake Atlantic and Pacific Tea Company, 299 U.S. 32, 57 S.Ct. 56, 81 L.Ed. 22 (1936) 12
Western and Southern Life Insurance Company v. State Board of Equalization, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) 9
Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985) 10, 14

STATUTES AND CONSTITUTIONS

Internal Revenue Code, § 501 (c) (12) 5
N.C.G.S. § 105-116 .....2, 3, 4, 14
N.C.G.S. § 117-10 5
N.C.G.S. § 117-19 5
United States Constitution, Fourteenth Amendment 3, 11, 12

MISCELLANEOUS

Rural Electrification Act, 7 U.S.C. 901, *et seq.*..... 8
Supreme Court Rule 13.1 4

TABLE OF AUTHORITIES—Continued

	Page
Supreme Court Rule 29.1	ii
United States Code, Title 28, § 1257	4
United States Code, Title 28, § 2101	4
16B C.J.S., Constitutional Law, Section 710	14
Federal Rules of Civil Procedure, Rule 25	ii
North Carolina Appellate Rule 31	4

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PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

OPINIONS BELOW

The Order of the North Carolina Supreme Court, dated June 15, 1990, dismissing Four County's appeal for lack of a substantial constitutional question and denying Four County's petition for discretionary review, has not yet been reported, and is reprinted in the Appendix hereto, at page 1a. The Opinion of the North Carolina Court of Appeals, dated December 5, 1989, is reported at 96 N.C. App. 417, 386 S.E.2d 107 (1989), and is reprinted in the Appendix, at page 3a. The Order of the North Carolina Court of Appeals denying Four County's petition for rehearing dated January 17, 1990, was not published and is reprinted in the Appendix at page 21a. The Order of the Superior Court of Wake County, North Carolina,

dated August 26, 1988, was not published, but is reprinted in the Appendix at page 12a. The Findings of Fact, Conclusions of Law and Decision of the Secretary of the North Carolina Department of Revenue, dated January 20, 1987, were not published, but are reprinted in the Appendix, at page 15a.

JURISDICTION

Four County Electric Membership Corporation sought a refund of franchise taxes paid to the Secretary pursuant to North Carolina General Statute ("G.S.") § 105-116(c), on the basis that the inclusion of Four County's patronage equity capital as gross receipts in the calculation of the tax due either constituted a misinterpretation of that statute or that such interpretation and/or the statute itself violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Pursuant to G.S. § 105-116, Four County submitted a quarterly report to the Secretary, reporting its gross receipts covering the fourth quarter of 1984. Based upon the quarterly report, the Secretary assessed Four County for franchise taxes due. The Secretary's franchise tax calculations were applied to patronage equity capital included in Four County's total gross receipts. Upon receipt of the Secretary's assessment, Four County filed an application for hearing before the Secretary, seeking a ruling that the franchise taxes assessed not be applied to Four County's patronage equity capital as a portion of its gross receipts. The Secretary conducted a hearing on the issues on July 10, 1986.

In the hearing, Four County raised the Fourteenth Amendment Equal Protection issue. Appendix, page 20a. Because the hearing was administrative in nature, rather than judicial, the Secretary concluded that she was precluded from addressing the constitutional issue. Appendix, page 20a.

On February 26, 1988, Four County filed a complaint in Wake County Superior Court asking that the Secretary "be directed to refund to [Four County] the portion of franchise taxes paid on patronage capital furnished by [Four County's] members for the year ending December 31, 1984." In paragraph 16 of its complaint, Four County alleged: "If N.C.G.S. 105-116 does include patronage capital as gross receipts for the purpose of determining franchise taxes, such inclusion is in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution." In an order dated August 26, 1988 and filed September 7, 1988, the Superior Court, ruling on the parties' cross-motions for summary judgment, granted the Secretary's motion and denied Four County's motion, without specifically addressing the constitutional questions. Appendix, page 12a.

On September 8, 1988, Four County timely filed its Notice of Appeal to the North Carolina Court of Appeals.

In Four County's Brief to the North Carolina Court of Appeals, Four County restated its position that the Secretary's application of G.S. § 105-116(c) violated Four County's rights under the Fourteenth Amendment's Equal Protection Clause. In its opinion dated December 5, 1989, the North Carolina Court of Appeals affirmed the Superior Court's grant of summary judgment in favor of the Secretary. Appendix, page 3a. The North Carolina Court of Appeals specifically held that the Secretary's application of G.S. § 105-116 "does not violate its [Four County's] constitutional rights." *Four County Electric Membership v. Powers*, 96 N.C. App. 417, 386 S.E.2d 107, 111 (1989).

Four County timely filed a Petition for Rehearing with the North Carolina Court of Appeals on January 11, 1990, which the Court of Appeals denied on January 17, 1990. Appendix, page 21a.

On February 1, 1990, Four County timely filed a Notice of Appeal and Petition for Discretionary Review

with the North Carolina Supreme Court. On June 13, 1990, the North Carolina Supreme Court, upon the Secretary's motion, dismissed Four County's appeal for lack of a substantial constitutional question and, further, denied Four County's Petition for Discretionary Review, making final the North Carolina Court of Appeals' December 5, 1989 judgment. Appendix, page 1a.

The North Carolina Supreme Court's dismissal of Four County's appeal constitutes a decision on the merits affirming the judgment of the North Carolina Court of Appeals, *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986), and is a final judgment rendered by the highest court of the State of North Carolina. The decision is reviewable pursuant to 28 U.S.C. § 1257(a).

Four County has timely filed this Petition for Writ of Certiorari to the United States Supreme Court pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

North Carolina Appellate Rule 31 is reprinted in the Appendix, page 24a.

Title 28, § 1257 of the United States Code is reprinted in the Appendix, page 22a.

Title 28, § 2101 of the United States Code is reprinted in the Apepndix, page 22a.

N.C.G.S. § 105-116 of the North Carolina General Statutes is reprinted in the Appendix, page 25a.

N.C.G.S. § 117-10 of the North Carolina General Statutes is reprinted in the Apepndix, page 29a.

N.C.G.S. § 117-19(b) of the North Carolina General Statutes is reprinted in the Appendix, page 29a.

STATEMENT OF THE CASE

North Carolina has for many decades imposed a franchise tax on (in the form of a percentage of the gross receipts for sales of service received by) certain public utilities, including the investor-owned power companies. By statutes enacted in 1965, the state for the first time brought its electric membership corporations, including Four County, under this franchise tax, as well as other taxes.

The principal, overall, general statute so enacted in 1965 was N.C.G.S. § 117-19(b), which reads as follows:

> With respect to its properties owned and revenues received on and after January 1, 1967, each electric membership corporation operating within the State shall be subject to, and shall pay taxes and assessments under, all laws relative to State, county, municipal and other local taxes and assessments applicable to the electric light and power companies in this State, except income tax.

From the inception of G.S. Chapter 117 in 1935, § 10 thereof has required such electric cooperatives to be "*not organized for pecuniary profit* for the purpose of promoting and encouraging the fullest possible use of electric energy . . . *at the lowest cost consistent with sound economy and prudent management of the business of such corporations.*" (Emphases supplied.)

Four County also has always operated on a nonprofit, tax-exempt basis pursuant to § 501(c)(12) of the Internal Revenue Code.

Obviously, there is tension between the nonprofit requirements of N.C.G.S. § 117-10 and that same section's

requirement for furnishing energy at the "lowest cost consistent with sound economy and prudent management." Electric cooperatives could never repay the principal of their substantial long-term capital indebtedness to the United States Rural Electrification Administration and otherwise improve their financial condition unless they designed their rates so as to bring in more revenues than the amounts necessary to meet just all of the ordinary costs and expenses of operation normally recognized by the Internal Revenue Service as allowable deductions. Therefore, in order to comply with both of those mandates, Four County's rates to its member-owners include charges for patronage equity capital as well as for the ordinary costs and expenses of providing electric service. These rates are billed each month, computed on the basis of the amount of electric power and energy used by each member-owner. But ratemaking, of course, is not a precision-capable science: It is impossible to so design rates that, from month to month, the billings may separately state precisely the portion thereof which each consumer is furnishing to the cooperative as patronage equity capital.

The parties stipulated that patronage capital constitutes:

> on an annual, fiscal year basis, total revenues received by EMC [Electric Membership Corporation] from monthly billings to its members for electric service rendered less related operating expenses arising from furnishing such electricity, including interest payments upon any debt capital used in providing electric service as well as depreciation upon operating facilities and equipment.

Four County's bylaws provide that "[a]ll amounts paid for electric service in excess of the cost thereof shall be furnished by members as capital, and each member shall be credited with the capital so furnished as provided in Article IX of these Bylaws."

The bylaws also provide that, on an annual basis, Four County must account to its member-owners for their respective shares of the amounts received in excess of operating costs and expenses. The bylaws further provide that the capital provided by the member-owners through payment of their bills constitutes capital "at the moment of receipt."

Four County from time to time refunds (redeems) patronage equity capital to its member-owners in accordance with its bylaws. It refunds all of the capital account upon the death of a member; also, it refunds to members generally upon a twenty-year cycle "in order of priority according to the year in which the capital was furnished and credited." Any such capital that goes unclaimed escheats to the state of North Carolina.

It is not in dispute that the literally billions of dollars received by investor-owned power companies in North Carolina from their issuances of common stock to their stockholder-owners is never subjected to North Carolina's gross receipts franchise tax.

What this case is all about, then, is whether the Equal Protection Clause of the Fourteenth Amendment is violated when North Carolina imposes that tax upon the portion of Four County's receipts which constitutes the payment to Four County of patronage equity capital by its member-owners.

REASONS FOR ALLOWANCE OF THE WRIT

Based upon all of the foregoing, Four County respectfully submits that the Court is presented with a truly substantial question deserving its plenary jurisdiction and decision. Multi-millions of dollars are involved for electric cooperatives, not only in North Carolina but in numerous other states which impose similar taxes on the gross receipts of electric cooperatives. (Indeed, as cited in the Alabama *Pea River* case, infra, one state has already ruled in favor of Four County's position in this case, based upon substantively the same state taxing statute and identical electric cooperative bylaws and patronage equity capital accounting and refunding practices.)

We present a question of national importance in another way. By its enactment in 1936—and by the subsequent administration and implementation—of the Rural Electrification Act, 7 U.S.C. 901, *et seq.*, the United States Congress has established a policy of aiding and encouraging the extension and furnishing of electric service, on a reliable basis and at reasonable rates, throughout the nation's rural areas, such as those served by Four County. Any state statute which, either by its wording on its face or by its interpretation and application, is violative of federal Constitutional strictures, and especially if it frustrates the achievement of a major congressionally adopted national policy, ought to be reviewed and ruled upon by this Court.

A third reason for the Writ to issue is simple justice. If not by this Court redressed, the North Carolina taxing scheme penalizes millions of rural North Carolinians in that their rates are otherwise higher than they would have to be and their electric cooperatives are placed at unfair disadvantage with the investor-owned power companies when they compete for the location of desirable electric loads.

WHERE THE APPLICABLE PRINCIPAL STATUTE PROVIDES THAT ELECTRIC COOPERATIVES WILL PAY THE SAME TAXES AS INVESTOR-OWNED POWER COMPANIES (INCOME TAXES EXCEPTED), EITHER THE TAXING STATUTES THEMSELVES OR THEIR ADMINISTRATION AND IMPLEMENTATION ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THEY IMPOSE TAXATION ON THE PATRONAGE EQUITY CAPITAL FURNISHED TO ELECTRIC COOPERATIVES BY THEIR MEMBER-OWNERS BUT NOT ON THE EQUITY CAPITAL FURNISHED TO INVESTOR-OWNED POWER COMPANIES BY THEIR STOCKHOLDERS.

While the Court has allowed the individual states latitude in enacting state taxation laws pursuant to equal protection guaranties, the states' laws must be rationally based and may not set up arbitrary classifications of property subject to taxation. *State Board of Tax Comrs. v. Jackson*, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931). When the challenged taxing statute does not adversely affect a fundamental interest, *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), or does not contain a classification based upon a suspect class, *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), the statute is tested under the standard of rationality that is traditionally applied to economic and commercial matters. Generally, a tax statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. *Western and Southern Life Insurance Company v. State Board of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

We are duly mindful of this Court's holdings that, even though the state has not specified a purpose for a statutory discrimination, the discriminatory classification must be upheld if there is *any* rational purpose which the legislature could have had in mind. Here, no

such rational basis is conceivable in view of the fact that North Carolina has, on the one hand, statutorily enjoined Four County to operate on a nonprofit basis and has, on the other hand and indeed in the same statutory sentence, required Four County to furnish service at the "lowest cost consistent with sound economy and prudent management" of its business. Not only is there no conceivable rational basis for the discriminatory taxing of equity capital of Four County, the Secretary, as the record will clearly demonstrate if allowed to come up, has never advanced or even speculated on any such rational basis.

In *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985), that Court evaluated a state use tax statute for the State of Vermont under the Equal Protection Clause. The Supreme Court applied as its standard of review the "rationality" test rather than the "strict scrutiny" test. The Court determined that the tax-payers in that case had stated an equal protection claim because the statute, on its face, created a "wholly arbitrary" distinction.

In *Williams*, the facts were as follows: Vermont collected a use tax when cars were registered in the state, but that tax was not imposed if the automobile was purchased in Vermont and a sales tax was paid in Vermont. Furthermore, the tax was reduced by the amount of any sales or use tax paid to another state if that state would afford a credit for taxes paid to Vermont in similar circumstances. The credit was only available, however, if the registrant was a Vermont resident at the time he paid the taxes. In the *Williams* case, an Illinois resident bought a new car in Illinois paying a 5% sales tax. Three months later, he moved to Vermont and was required when registering his automobile in Vermont to pay a use tax. He was not allowed to receive the credit for the 5% sales tax already paid in Illinois. However, a Vermont resident who had purchased a new vehicle in Illinois and paid a 5% sales tax would have been allowed to receive that credit.

The plaintiff alleged a violation of the Equal Protection Clause of the Fourteenth Amendment because he was not afforded the credit for out-of-state sales taxes that he had paid. The lower court dismissed the complaint and the Vermont Supreme Court affirmed. This Court reversed and remanded for further proceedings consistent with its opinion. The Court held that: "When the statute is viewed on its face, appellants have stated a claim of unconstitutional discrimination." 472 U.S. at 28. The Court reasoned that to provide a credit only to those who were residents at the time they paid sales tax to another state is an arbitrary distinction that violates the Equal Protection Clause. The Court stated specifically:

> In sum, we can see no relevant difference between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere. To free one group and not the other from the otherwise applicable tax burden violates the Equal Protection Clause.

472 U.S. at 27.

The Court explained that the only plausible justification for imposing the use tax on purchasers of vehicles was the principle that those using the state's roads should pay for them; however, under that principle, there was no rational reason to spare Vermont residents that same burden. The Court noted that the Vermont statute would have been sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. The Court noted, however, that no legitimate purpose was furthered by the discriminatory exemption within the Vermont statute.

In *Stewart Dry Goods Company v. Lewis*, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054, reh. den. 295 U.S. 768, 55 S.Ct. 652, 79 L.Ed. 1709 (1935), the Supreme Court held that a state sales tax denied equal protection to persons or businesses against which it discriminated arbi-

trarily. A Kentucky statute imposed sales taxes on annual gross sales, with the first $400,000 taxed at one rate and each additional $100,000 taxed at an increased rate up to $1,000,000. This Court stated:

> Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned.

294 U.S. at 557.

The state argued that the statute made an excise on the privilege of merchandising at retail, that the amount of tax was measured by the volume of sales and that a merchant's net income and his consequent ability to pay the tax increased as the volume of sales grew. The Court noted, however, that the taxes exacted from the merchant doing the greater business were not only greater in gross amount but larger in proportion to sales than that demanded of the smaller competitor.

The state also argued that the statute merely provided a less complicated and more convenient substitute for an income tax. This Court rejected that argument, responding that: "If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection." 294 U.S. at 560. Therefore, the gross sales tax which classified vendors solely by reference to volume of their transaction was a denial of equal protection of the laws in violation of the Fourteenth Amendment.

In *Valentine v. Drake Atlantic and Pacific Tea Company*, 299 U.S. 32, 57 S.Ct. 56, 81 L.Ed. 22 (1936), this Court affirmed a federal district court judgment enjoining the enforcement of an Iowa tax on gross receipts

from sales by chain stores according to an accumulative graduated scale. Without discussion, the Court affirmed the federal district court and specifically relied upon the authority of *Stewart Dry Goods Company v. Lewis*, supra.

The Alabama courts have addressed the very same issue of patronage equity capital being included in a gross receipts tax in *State v. Pea River Electric Cooperative*, 434 So.2d 785 (Ala. Civ. App. 1983). The trial court in *Pea River*, whose findings and conclusions were adopted by the appellate court, grasped the essential nature of this issue when it stated:

> the distinction between a privately owned public utility—profit oriented—and a membership electric cooperative—non-profit in nature—is significant in the context of the taxing statute. Capital contributions made to a privately owned utility in the form of purchases of stock are, of course, not subject to the utility tax. The expert proffered by Pea River noted that the capital contributions are legal liabilities owed by Pea River to its members which accrue upon billing and are ascertainable, as to precise amount, at the end of the fiscal year.

State v. Pea River, No. 81-1591-G, slip op. at 5 (Montgomery County Ct. Aug. 4, 1982). The Pea River bylaws are substantively identical to the relevant portions of the Four County bylaws. The trial court concluded that the patronage capital was "a definite, ascertainable amount . . . and constitute[s] a legal obligation owed by Pea River to the member." *Id.*, slip op. at 6. The Alabama Court of Civil Appeals affirmed the Circuit Court of Montgomery County, the trial court.

The logic enunciated by the *Pea River* court recognizes the great distinction between the capital contribution paid by the member-owner every month and that portion of his bill which constitutes a charge for electric service. The investor-owned utility bills only for electric

service and, consequently, is not required to pay a tax on its equity capital. North Carolina's statute, as did the statutes in *Williams* and *Stewart Dry Goods*, imposes differing burdens on like classified businesses.

Four County did not contend below, nor does it contend here, that the specific franchise tax statute, G.S. § 105-116, is per se unconstitutionally discriminatory on its face. Rather, Four County contended and contends that the Secretary applies it in an unconstitutionally discriminatory manner by including patronage equity capital as an element of gross receipts in the calculations of Four County's tax. (However, if this Court deems itself bound by North Carolina's interpretation and application of G.S. § 105-116, it may, of course and as it should, declare that statute unconstitutional to the extent of its over-reach in taxing Four County's patronage equity capital.) *See Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962).

As stated in a treatise:

> The guaranty of equal protection is not limited to the enactment of fair and impartial legislation, but necessarily extends to its application. Equal protection prevents the inequitable administration of laws by both state and federal courts. A law nondiscriminatory or fair on its face may be struck down as a denial of equal protection if it is unreasonably, unfairly, or arbitrarily discriminatory in its operation or enforcement.

16B C.J.S., *Constitutional Law*, Section 710.

The decision of the North Carolina Court of Appeals and the subsequent dismissal of Four County's Notice of Appeal by the North Carolina Supreme Court amounts to their refusal to recognize a specific basic concept: Patronage equity capital is capital furnished by the member-owners on a regular basis, not proceeds from electric service. Because patronage capital is equity

capital, Four County, in accordance with its bylaws, is contractually obligated to return (redeem by retiring) this capital in its proper proportionate amounts to each of its member-owners.

The Secretary's failure to recognize that patronage equity capital is the equivalent of the sale by an investor-owned utility of common stock causes her to treat like items—in this particular case, the capital of a public utility—dissimilarly. She taxes Four County's capital and billings for electric service while she only taxes billings for electric service of the investor-owned utilities. The Secretary's decision allows the investor-owned utility the competitive advantage of not having to pay a franchise tax on its capital. This is particularly significant in those geographic areas of North Carolina where electric cooperatives must compete with investor-owned utilities for customers. When North Carolina's franchise taxes are arbitrarily and discriminatorily applied to the electric cooperatives, their rates suffer an adverse impact: They must be higher, not only giving unfair advantage to the investor-owned utilities, but imposing a punitive financial burden upon them and their member-consumers.

CONCLUSION

By refusing to recognize the concept of patronage equity capital as the equivalent of capital raised by the sales of stocks by investor-owned utilities, North Carolina unconstitutionally discriminates against Four County and in indefensible favor of investor-owned utilities, like classified corporations.

For these reasons, the Court should allow this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

No. 50P90

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION

v.

HELEN A. POWERS, in her official capacity as Secretary of the North Carolina Department of Revenue

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From Wake

(8910SC34)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant; and upon consideration of the petition for discretionary review of the decision of the North Carolina Court of Appeals, filed by Plaintiff pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

> "Allowed by order of the Court in conference, this the 13th day of June 1990.

s/ Whichard, J.
For the Court"

The Petition for Discretionary Review is:

"Denied by order of the Court in conference, this the 13th day of June 1990.

s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of June 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

/s/ Peggy N. Byrd
Assistant Clerk

NORTH CAROLINA COURT OF APPEALS

No. 8910SC34

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION

v.

HELEN A. POWERS, in her official capacity as Secretary of the North Carolina Department of Revenue

---

Wake County

No. 88CVS1884

Filed: 5 December 1989

Appeal by plaintiff from order signed 26 August 1988 by Judge Coy E. Brewer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 30 August 1989.

Plaintiff-taxpayer, Four County Electric Membership Corporation ("Four County" or "Taxpayer"), seeks a refund of certain franchise taxes it has paid on the grounds that monies it received as patronage capital should not be included as "gross receipts" for purposes of G.S. sec. 105-116. This statute imposes a franchise tax on the "total gross receipts" of all corporations, profit and nonprofit, which are engaged in the business of furnishing electricity. Plaintiff raised this issue in a

hearing before the Secretary of Revenue on 10 July 1986. The Secretary entered a final decision on 20 January 1987 in which she made findings of fact and concluded as a matter of law that that there is "no deduction or exemption from the gross receipts tax levied in G.S. 105-116 for patronage capital or operating credits." The Secretary therefore upheld the proposed assessment in question and denied plaintiff's claim for refund.

Plaintiff paid the amount assessed under protest and instituted this action in superior court against the Secretary for a refund pursuant to G.S. sec. 105-267. Upon cross-motions for summary judgment which were both supported by affidavits, exhibits, briefs and arguments of counsel, the trial court held that there was no genuine issue as to any material fact and that the defendant Secretary of Revenue was entitled to judgment as a matter of law. Plaintiff appealed the order to this Court in apt time.

Crisp, Davis, Schwentker, Page & Currin, by William T. Crisp, II and Cynthia M. Currin, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the defendant-appellee Secretary of Revenue.

JOHNSON, Judge.

Four County is a nonprofit electric cooperative corporation organized pursuant to Chapter 117 of the North Carolina General Statutes. It also meets the requirements for tax exempt status under section 501 (c) (12) of the Internal Revenue Code.

Each month Four County sends bills to its customers (who are also considered to be members of the cooperative) for electricity furnished. From these amounts received, Four County, pursuant to its bylaws, allocates on its books and records part of each customer's pay-

ment as "patronage capital." Four County has stipulated that the term "patronage capital" means "total revenues received by Four County Electric Membership Corporation from monthly billings to its members for electrical service rendered less related operating expenses arising from furnishing such electricity, including interest payments upon any debt capital used in providing electric service as well as depreciation upon operating facilities and equipment." The Taxpayer has also stipulated that patronage capital is determined after the close of its fiscal year, and that at the time of rendering bills, it cannot determine the amount of a bill which will go to patronage capital.

Four County's bylaws provide that the Board of Directors has, at its discretion, upon the death of a patron, the power to retire that patron's capital, "PROVIDED, however, that the financial condition of the Cooperative will not be impaired thereby." The Taxpayer addressed this issue in greater detail in its "General Policy No. 422," which states in part that the Cooperative does not

> commit itself to retire all or any portion of a deceased member's capital credits, except upon determination by the Board of Directors, in each and every case, that the financial condition of the Cooperative will not thereby be impaired . . .; nor shall the inauguration of this Policy in any way presume its permanent continuance, the Board of Directors, pursuant to its powers and responsibilities by law and the Bylaws prescribed, retaining the prerogative to rescind it altogether or to amend it on the basis of generally applicable principles at any time.

As to general retirement of patronage capital, Four County states in its notice of Capital Credit Assignments to its patrons that "[t]he Cooperative is currently striving to make a general retirement of Capital Credits on a

20-year rotation basis as long as it is economically sound to do so."

Four County contends on appeal that it should be allowed to exclude from its "gross receipts" that amount from each patron's monthly payment which it credits on its books to patronage capital. Taxpayer makes a "subordinate alternative" argument that it should at least be allowed to exclude from gross receipts the amount of patronage capital it actually returns to patrons.

We observe at the outset that the franchise tax is not an income tax, but rather is a tax imposed on corporations for the privilege of engaging in business in this state. G.S. sec. 105-114. This tax varies according to the nature, extent and magnitude of the business transacted in this state by a corporation. Telephone Co. v. Clayton, Comr. of Revenue, 266 N.C. 687, 147 S.E.2d 195 (1966). Our Supreme Court has also stated that it "depends upon the amount of business transacted by the corporation." Worth v. Railroad, 89 N.C. 301, 306 (1883).

This Court and our Supreme Court have analyzed the meaning of the term "gross receipts" for purposes of franchise taxation of telephone companies as governed by G.S. sec. 105-120. *Telephone Co. v. Clayton, Comr. of Revenue, supra*; In re Proposed Assessment of Carolina Telephone, 81 N.C. App. 240, 344 S.E.2d 46, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 465 (1986). G.S. sec. 105-120 defines "gross receipts" for purposes of telephone company franchise taxes as "all rentals, other similar charges, and all tolls received from business." G.S. sec. 105-120(b). Unlike G.S. sec. 105-120, G.S. sec. 105-116, which governs franchise taxation of public service companies and is applicable to the instant case, does not contain descriptive language to aid in defining the term "gross receipts." It states simply that the taxpayer is to make a quarterly report stating, in part, the "total gross receipts . . . from such business." G.S. sec. 105-116(a)

(1) and (2). G.S. sec. 105-116(b) does refer to certain gross receipts to be deducted from taxable total gross receipts. No mention is made of an offset for patronage capital. We also find no reference to such a deduction in the Chapter 117 of the General Statutes which governs electric membership corporations.

Taxpayer's business is that of providing electric service to its patron customers. The monies generated by the monthly charges billed for electric service constitute its "gross receipts" and they are indicative of the amount of business transacted by Four County. The "patronage capital" which Taxpayer wishes to exclude from its gross receipts is generated from monthy [sic] charges to customers.

"Gross receipts" is defined as "the *total amount* of money . . . *received* from selling property or from performing services." Black's Law Dictionary 633 (5th ed. 1979) (citation omitted) (emphasis added). Important to this definition is the concept that it is the character of funds at the time of receipt that matters. Disbursements made subsequent to this taxable event from the total amount received do not diminish the amount of gross receipts. *See* New Cornelia Cooperative Mercantile Co. v. Arizona State Tax Com'n., 23 Ariz. App. 324, 533 P.2d 84 (1975); Tyler Lumber Co. v. Logan, 293 Minn. 1, 195 N.W.2d 818 (1972).

In the case before us, Four County admits that at the time of billing, it cannot determine the amount it will ultimately allot to patronage capital. It is noteworthy that the monthly bills sent out by Four County simply state a total amount due for "electric service." The determination of patronage capital is due in part to Taxpayer's analysis of events occurring later in its fiscal year. By its very nature, a gross receipt is determined at the time of receipt. Therefore, events which may occur after consummation of the sale of electricity are not relevant to determining the gross receipts figure. *Id.*

In concluding that amounts designated by Four County on its books as "patronage capital" are part of gross receipts, we are guided by the reasoning of our Supreme Court in Realty Corp. v. Coble, Sec. of Revenue, 291 N.C. 608, 231 S.E.2d 656 (1977). In *Realty Corp.*, the Court rejected the argument of the taxpayer (who elected to use the installment method of accounting) that it should be allowed to deduct future potential state and federal income tax liability from its franchise tax base under G.S. sec. 105-122(b). In so doing, the Court set out principles which are relevant here. First, even though a taxpayer may be using correct accounting practices, the statute itself must control the accounting methods to be used for computing the franchise tax base. Second, the Court found that the taxes the taxpayer wished to deduct were not deductible since they were not "definite and accrued legal liabilities" as required by applicable G.S. sec. 105-122. In the instant case, the applicable statute has no provision for deducting "definite and accrued legal liabilities." We are therefore especially reluctant to allow Four County to deduct patronage capital when it is not under any pre-existing legal duty to return any set amount of funds to its patrons at the time it receives monthly payments from them. Although it claims that patronage capital is credited to the patron's account "at the moment of receipt," Taxpayer has stipulated that at the time of rendering a bill, it cannot determine what percentage of the bill will ultimately go to patronage capital. It is also important that, as quoted above, Four County's own bylaws give it wide discretion in returning patronage capital. Therefore, pursuant to *Realty Corp.*, we must conclude that the mere fact of a bookkeeping entry in taxpayer's records is insufficient under these facts to create a deduction from Taxpayper's [sic] franchise tax base.

We are also unpersuaded by two consolidated cases from Alabama which Four County cites to us, Alabama v. Pea River Electric Cooperative, 434 So.2d 785 (Ala.

Civ. App. 1983), *cert. denied*, No. 82-693 (Ala. filed 1 July 1983). The Alabama Court appeared to be influenced by various past ruling of the Alabama Commissioner of Revenue which indicated that capital received by a cooperative in excess of its operating costs was not subject to the gross receipts tax. *Id.* We are unaware of revenue rulings to that effect in North Carolina. We also note that the *Pea River* decision was rejected by the Oregon Supreme Court in Lane Electric Cooperative v. Department of Revenue, 307 Or. 226, 765 P.2d 1237 (1988). That court, in finding the taxpayer's reliance on *Pea River* misplaced, stated in a footnote that "[t]he decision in [*Pea River*] apparently is based on established policy in Alabama. No such policy exists in Oregon." 307 Or. at ——, 765 P.2d at 1239, n.2. We also know of no such policy in North Carolina. Indeed, in North Carolina, the construction of a revenue act by the Secretary of Revenue, although not binding, will be given due consideration by the court. *Realty Corp., supra.* In the instant case the Secretary determined that patronage capital is not excludable from "gross receipts" and we must accord this determination due consideration. Second, the Alabama Court in *Pea River* also relied on a state statute which mandates that Alabama cooperatives *shall* distribute to members revenues in excess of amounts needed for operation and maintenance of the cooperative. North Carolina has no such statute and in our view, Four County's bylaws afford it too much discretion to create a pre-existing legal obligation. Boyce v. McMahan, 285 N.C. 730, 208 S.E.2d 692 (1974); MCB Limited v. McGowan, 86 N.C. App. 607, 359 S.E.2d 50 (1987).

We turn now to Taxpayer's alternative argument that it should be allowed to deduct patronage capital actually repaid from its franchise tax base. Consistent with our previous analysis, we view this repayment as merely a disbursement from original gross receipts received from the sale of electricity which does not alter the amount of

gross receipts. We therefore reject Taxpayer's alternative argument.

Finally, we address Four County's contention that denying it a deduction for patronage capital while investor-owned utilities do not pay franchise taxes on funds generated by the sale of stocks or bonds is a violation of equal protection of the laws under the Fourteenth Amendment to the United States Constitution, of Article I, Section 19 of the North Carolina Constitution, and also a violation of Article V, Sections 2 and 3 of the North Carolina Constitution, which require that taxes be levied by "uniform rule."

In *Realty Corp., supra*, at 617, 231 S.E.2d at 662, our Supreme Court stated the following:

> "'[T]he requirements of "uniformity," "equal protection," and "due process," are, for all practical purposes, the same under both the State and Federal Constitutions.'" A tax is uniform when it imposes an equal tax burden upon all members of a particular class. Hajoca Corp. v. Clayton, Comr. of Revenue, [277 N.C. 560, 568, 178 S.E.2d 481, 486 (1971)]. As long as a classification is not arbitrary or capricious, but rather founded upon a rational basis, the distinction will be upheld by the Court. (Citations omitted.)

We hold that the application of G.S. sec. 105-116 to Taxpayer does not violate its constitutional rights. We find Four County's comparison of the tax treatment of the sale of stocks and bonds by investor-owned utilities to be faulty. The issue is whether G.S. sec. 105-116 taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor-owned utilities. Each must pay franchise taxes upon its gross receipts and neither can deduct amounts it may record as patronage capital. Also, neither pays franchise tax on stocks or bonds it may issue.

The tax treatment of the sale of stocks and bonds is separate and distinct from that of taxing the act of furnishing electricity and not linked by statute. Taxpayer's complaint is that it has formed itself under section 501 (c) (12) of the federal Internal Revenue Code, and therefore is apparently restricted from selling stocks and bonds. This federal provision is, however, unrelated to our franchise tax statute.

We again find that principles of *Realty Corp.*, *supra* are instructive. The taxpayer in *Realty Corp.* alleged denial of equal protection because as a "cash basis" taxpayer it could not claim certain deductions available to an "accrual basis" taxpayer. In finding no equal protection violation, the Court observed that plaintiff had "voluntarily elected to place itself in the classification about which it now complains; to wit, a cash-basis taxpayer reporting its income under the installment method." 291 N.C. at 618, 231 S.E.2d at 662. Similarly, in the instant case, Four County has elected to operate as a federal tax-exempt entity which cannot issue stocks and bonds. As in *Realty Corp.*, *supra*, this election does not, however, create a viable equal protection issue for Taxpayer.

Different treatment under the franchise statute of patronage capital and funds received from the sale of stocks and bonds is based on a rational reason. Snyder v. Maxwell, Comr. of Revenue, 217 N.C. 617, 9 S.E.2d 19 (1940). Unlike funds received from the sale of stocks and bonds, monies ultimately termed patronage capital by Four County are merely part of the gross received for the sale of electricity when billings are rendered. Patronage capital ultimately owed to Taxpayer's members is at the time of receipt uncertain as to both amount and fact of liability. Differing treatment for such unrelated activities is certainly rational.

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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88 CVS 1884

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION,
Plaintiff,

v.

HELEN A. POWERS, in her official capacity as Secretary of the North Carolina Department of Revenue,
Defendant.

ORDER

THIS MATTER coming on to be heard and being heard before the undersigned Judge Presiding at the 8 August 1988 civil term of the superior court of Wake County upon motion of the Plaintiff for summary judgment filed 28 July 1988 and upon motion of the Defendant for summary judgment filed 29 July 1988; and

THE COURT, having reviewed the pleadings, the record (including the transcript of hearing, the exhibits and the stipulations) from the hearing before the Secretary of the Department of Revenue, the affidavits filed in support of both the Plaintiff's and the Defendant's motions for summary judgment, the admissions, the answers to interrogatories, the documents and exhibits produced upon discovery, and having reviewed the briefs and authorities of both parties, and having heard the arguments of respective counsel, finds that there are no genu-

ine issues as to any material fact and that the Defendant is entitled to judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion of the Defendant for summary judgment is hereby allowed and this action is dismissed; that the motion of the Plaintiff for summary judgment is denied both as to the superior relief sought, and as to the alternative subordinate relief sought; and that the costs shall be taxed to the Plaintiff.

By consent of the parties, this order may be signed out of term.

This the — day of August, 1988.

/s/ Coy E. Brewer, Jr.
COY E. BREWER, JR.
Superior Court Judge Presiding

[Exception No. 1]

NOTICE OF APPEAL

Plaintiff, Four County Electric Membership Corporation, gives Notice of Appeal to the North Carolina Court of Appeals from the Order of the Honorable Coy E. Brewer, Jr., on the 26th day of August, 1988.

This the 19th day of August, 1988.

CRISP, DAVIS, SCHWENTKER,
PAGE & CURRIN

By: /s/ Cynthia M. Currin
CYNTHIA M. CURRIN
Attorneys for Plaintiff
3739 National Drive
Cumberland Building, Suite 225
Post Office Drawer 30489
Raleigh, North Carolina 27622
(919) 787-4007

APPEAL ENTRIES

Plaintiff gave due notice of appeal to the Court of Appeals. Appeal bond in the sum of —— is adjudged to be sufficient. Plaintiff is allowed — days in which to serve the proposed record on appeal, and Defendant is allowed — days thereafter within which to serve objections or a proposed alternative record on appeal.

This the — day of August, 1988.

/s/ Coy E. Brewer, Jr.
COY E. BREWER, JR.
Superior Court Judge Presiding

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE SECRETARY OF
REVENUE OF NORTH CAROLINA

IN THE MATTER OF:

Four County Electric Membership Corporation:

a. Application for hearing in denial of refund relative to franchase taxes paid for the years 1981, 1982, and 1983;

b. Application for hearing on proposed assessment of franchise tax for the calendar quarter ended December 31, 1984

FINAL DECISION

This matter was heard before the Secretary of Revenue in the city of Raleigh on July 10, 1986, upon an application for hearing filed by the taxpayer, Four County Electric Membership Corporation (EMC). Those in attendance included Larry D. Rogers, Director, and John A. Slocumb, Administrative Officer, of the Corporate Income and Franchise Tax Division of the Department of Revenue, and George W. Boylan, Special Deputy Attorney General. William T. Crisp and Robert B. Schwentker appeared as counsel on behalf of the taxpayer.

ISSUE

Do total revenues derived from monthly billings to EMC customers constitute gross receipts for purposes of the franchise taxes imposed pursuant to General Statute 105-116?

EVIDENCE

1. Stipulations entered into by the parties on July 2, 1986, referencing the following exhibits:

Exhibit A, letter from William T. Crisp to Keith Goodson dated January 24, 1985;

Exhibit B, franchise tax returns filed by EMC for 1981, 1982 and 1983;

Exhibit C, amended franchise tax returns filed by EMC for 1981, 1982 and 1983;

Exhibit D, franchise tax return filed by EMC for the fourth quarter of 1984;

Exhibit E, legal memorandum prepared by William T. Crisp in support of the position of EMC as set forth in his letter of January 24, 1985, and also containing the decisions of the circuit court, and the Alabama Court of Civil Appeals, in *State of Alabama v. Pea River Electric Corporation*, 434 So. 2d 785 (1983);

Exhibit F, letter from Keith Goodson to William T. Crisp, dated March 28, 1985;

Exhibit G, letter from Keith Goodson to EMC, dated June 21, 1985, denying the claim for refund and containing a notice of proposed assessment;

Exhibit H, notice of proposed assessment dated June 24, 1985;

Exhibit I, letter from William T. Crisp to Keith Goodson dated July 18, 1985, requesting a hearing before the Secretary of Revenue;

Exhibit J, affidavit of Richard Steven Morgan dated June 9, 1986.

2. Exhibit K, letter from William T. Crisp to Myron C. Banks dated February 20, 1985.

3. Exhibit L, letter from Lacy H. Thornburg to William T. Crisp dated May 6, 1985.

4. Exhibit M, letter from William T. Crisp to Lacy H. Thornburg dated May 9, 1985.

5. Exhibit N, letter from Lacy H. Thornburg to William T. Crisp, dated May 21, 1985.

6. Exhibit O, Notice of Capital Credit Assignments for 1980, 1981, 1982 and 1983.

7. Exhibit P, exemption letter from the United States Treasury Department to the taxpayer dated December 21, 1966.

8. Exhibit Q, copy of Section 501(c)(12) of 1954 Internal Revenue Code.

9. Exhibit R, form 990 (federal), Return of Organization Exempt from Income Tax.

10. Exhibit S, copies of G.S. 117-10 and 117-19.

11. Exhibit T, copy of Chapter 287 of the 1965 Session Laws.

12. Exhibit U, copies of G.S. 105-144 (Session Laws 1945), and of G.S. 105-354 through 355 (Session Laws 1943).

13. Exhibit V, resume of John C. Romano.

14. Two invoices issued by the taxpayer identified as account number 33917-00 and account number 08558-01 constituting representative monthly billings by it to its members/patrons for the period in question.

15. Testimony of witnesses on behalf of the taxpayer consisting of:

a. Margaret Trainer (T pp 2-4);

b. John C. Romano (T pp 5-9);

c. Earl C. Robinson (T pp 10-17);

d. Keith Goodson (T pp 18-30);

e. John A. Slocumb (T 31);

f. Larry D. Rogers (T pp 31-39).

FINDINGS OF FACT

1. The taxpayer is a North Carolina corporation organized pursuant to Chapter 117 of the General Statutes with its principal place of business in Burgaw, North Carolina, and is engaged in the business of furnishing electricity to those of the general public who choose to become members/patrons of the corporation.

2. Taxpayer is a nonprofit corporation exempt from federal income taxation pursuant to Section 501(c)(12) of the 1954 Internal Revenue Code.

3. The taxpayer charges its members/patrons pursuant to monthly billings an hourly kilowatt rate for the metered electrical services it furnishes.

4. As stipulated by the taxpayer and the Department of Revenue, "patronage capital" and "capital credits" constitute:

> "on an annual, fiscal year basis, total revenues received by EMC from monthly billings to its members for electrical service rendered less related operating expenses arising from furnishing such electricity, including interest payments upon any debt capital used in providing electric service as well as depreciation upon operating facilities and equipment."

5. Pursuant to its bylaws, the taxpayer determines patronage capital upon its books and records after the close of its fiscal year.

6. In accordance with its bylaws, upon the death of any member/patron, the taxpayer may, but is not required to, retire in full or in part the patronage capital of such member which it has credited on its books and records, if its financial condition will not be impaired

thereby, and if so requested in writing by the member's representative.

7. In accordance with its bylaws and subject to their amendment, the taxpayer strives to return to its members/patrons patronage capital on a 20 year rotation basis as long as it is economically sound to do so.

8. EMC funds its operating expenses, reserves and capital improvements from the revenues derived from its monthly billings to members/patrons for electrical service.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Secretary of Revenue makes the following conclusions of law:

1. As a consequence of its engaging in the business of furnishing electricity in this State, the taxpayer is subject to taxation under G.S. 105-116 upon the gross receipts therefrom.

2. The tax imposed by G.S. 105-116 is due and payable quarterly within 30 days after the first day of January, April, July and October.

3. As soon as practicable after it receives from the taxpayer and from all other public service companies subject to G.S. 105-116 the quarterly gross receipts tax imposed by G.S. 105-116, the Department of Revenue is required to distribute a portion thereof to the municipalities in which the sales of electricity occurred.

4. What the taxpayer classifies upon its books and records as patronage capital and operating credits in accordance with its bylaws is determined after the close of its fiscal year, and is derived from its business of furnishing electrical service for sale.

5. There is no deduction or exemption from the gross receipts tax levied in G.S. 105-116 for patronage capital or operating credits.

6. The notice of proposed assessment against the taxpayer was properly issued pursuant to G.S. 105-241.1

and is hereby sustained in its entirety. The taxpayer's claim for refund is denied.

7. The Secretary of Revenue is precluded from passing upon the constitutional issues raised by the taxpayer.

DECISION

The asserted patronage capital is said to arise as a result of the elective contractual agreements existing between the taxpayer and its members/patrons. Its annual calculation is incompatible with the quarterly levy of the gross receipts tax imposed by G.S. 105-116, from which collections the Department of Revenue is required to make contemporaneous distributions to third parties. No deduction or exemption from such taxation for patronage capital has been expressly provided in G.S. 105-116, although other offsets are enumerated therein. We see no language in Chapter 117 of the General Statutes from which an inference of such deductibility might be made, although the Legislature could have clearly provided for same when it rewrote material portions of Chapter 117 several years ago.

The Alabama case, which predicates the taxpayer's position, is inapplicable because in that jurisdiction by virtue of a state statute, patronage capital must upon a fiscal year basis be returned in one form or another to members of a cooperative. The taxpayer labors under no such comparable statutory mandate because it may or may not return or retire patronage capital, dependent upon the current state of its bylaws, and further conditioned upon its analysis of its general financial condition.

Made and entered this 20th day of January, 1987.

/s/ Helen A. Powers
HELEN A. POWERS
Secretary of Revenue

NORTH CAROLINA COURT OF APPEALS

No. 8910SC34

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION

v

HELEN A. POWERS, in her official capacity as Secretary of the North Carolina Department of Revenue

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County: Wake

Number: 88CVS1884

ORDER

The following Order was entered:

> "The petition filed in this cause on the 11th day of January, 1990 and designated "Petition For Rehearing" is denied. By order of the Court this 17th day of January, 1990."

The above order is therefore certified to the Clerk of Superior Court in Wake County, North Carolina.

Witness my hand and official seal this the 17th day of January, 1990.

/s/ Francis E. Dail
Clerk of the Court of Appeals

Orig CSC

cc: William T. Crisp
Robert B. Schwentker
Cynthia M. Currin
George W. Boylan

STATUTORY PROVISIONS

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit

or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

Rule 31. Petition for Rehearing

(a) Time for Filing; Content. A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law in which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party of the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) How Addressed; Filed. A petition for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered. Two copies thereof shall be filed with the clerk.

(c) How Determined. Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) Procedure When Granted. Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one

has been ordered by the Court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 30 days after the case is certified for rehearing, and the opposing party's brief, within 30 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) Stay of Execution. When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) Waiver of Appeal From Court of Appeals. The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) No Petition in Criminal Cases. The courts will not entertain petitions for rehearing in criminal actions.

§ 105-116. Franchise or privilege tax on electric light, power, gas, water, sewerage, and other similar public service companies not otherwise taxed.

(a) Every person, firm or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or piped gas, or owning and/or operating a water system subject to regulation by the North Carolina

Utilities Commission, or owning and/or operating a public sewerage system, shall, within 30 days after the first day of January, April, July and October of each year, make and deliver to the Secretary of Revenue, upon such forms and blanks as required by him, a report verified by the affirmation of the officer or authorized agent making such report and statement, containing the following information:

(1) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this State.

(2) The total gross receipts for the same period from such business within this State.

(3) The total gross receipts from the commodities or services described in this section sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a municipality having an ownership share in a project established under that Chapter.

(4) The total amount and price paid for such commodities or services purchased from others engaged in the above-named business in this State, and the name or names of the vendor.

(5) As to gas companies, the gross receipts derived from sales of piped gas to manufacturers which is to be used as an ingredient or component of a manufactured product.

Gross receipts shall be reported on an accrual basis.

(b) From the total gross receipts within this State there shall be deducted the gross receipts reported in subsection (a) (3) of this section.

(c) An annual franchise or privilege tax at the rates specified in this subsection is levied on the businesses

listed in subsection (a). This tax is for the privilege of engaging in business in this State and is due and payable quarterly to the Secretary of Revenue when the report required by subsection (a) is filed. The tax on a public sewerage company is at the rate of six percent (6%) of the total gross receipts of the company derived within the State. The tax on an electric power company or a gas company is at the rate of three and twenty-two hundredths percent (3.22%) of the total gross receipts derived within the State. The tax on water companies is at the rate of four percent (4%) of the total gross receipts derived within the State. All deductions allowed by this section shall first be subtracted from total gross receipts to determine the total taxable gross receipts.

The tax imposed by this section does not apply to special charges collected within this State by natural gas utilities pursuant to drilling and exploration surcharges approved by the Utilities Commission, where such surcharges are segregated from the other receipts of the natural gas utility and are devoted to drilling, exploration and other means to acquire additional supplies of natural gas for the account of natural gas customers in North Carolina and where the beneficial interest in said surcharge collections is preserved for the natural gas customers paying said surcharges under rules established by the Utilities Commission.

In determining the total tax payable by any company under this section, there shall be allowed as a credit on such tax the amount of the credit authorized by Division V of Article 4 of this Chapter.

(d) Repealed by Session Laws 1973, c. 1287, s.3.

(e) The report herein required of gross receipts within and without the State, shall include the total gross receipts for the period stated of all properties owned and operated by the reporting person, firm, or corporation on the first day of each calendar quarter year, whether

operated by it for the previous annual period, or whether intermediately acquired by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each calendar quarter year with reference to the gross receipts of the property operated for the previous calendar quarter year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of January, April, July and October of each year.

(f) Companies taxed under this section shall not be required to pay the franchise tax imposed by G.S. 105-122 or G.S. 105-123 unless the tax levied by G.S. 105-122 or G.S. 105-123 exceeds the tax levied in this section, and no county shall impose a franchise, license or privilege tax upon the business taxed under this section.

(g) The Secretary of Revenue shall determine the total gross receipts derived from the sale within each municipality of the commodities or services described in this section, except water and sewerage services, and shall distribute to each municipality an amount equal to a tax of three and nine hundredths percent (3.09%) of the gross receipts from sales within the municipality. In determining the amount to be distributed to a municipality pursuant to this subsection, gross receipts from sales within a municipality do not include receipts from sales of piped gas to a manufacturer for use as an ingredient or component part of a manufactured product.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Secretary of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

So long as there is a distribution to municipalities of the amount herein provided from the tax imposed by this

section, no municipality shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947. If any municipality shall have collected any privilege, license or franchise tax between January 1, 1947 and April 1, 1949, in excess of the tax collected by it prior to January 1, 1947, then upon distribution of the taxes imposed by this section to municipalities, the amount distributable to any municipality shall be credited with such excess payment.

(h) For purposes of subsection (g) and of G.S. 105-120(d), the term "municipality" includes any urban service district defined by the governing board of a consolidated city-county, and the amounts due thereby shall be distributed to the government of the consolidated city-county. (1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1959, c. 1259; s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1; 1973, c. 476, s. 193; c. 537, s. 3; c. 1287, s. 3; c. 1349; 1975, c. 812; 1983 (Reg. Sess., 1984), c. 1097, ss. 2, 16; 1987 (Reg. Sess., 1988), c. 882, s. 4.4.)

§ 117-10. Formation authorized.

Any number of natural persons not less than three may, by executing, filing and recording a certificate as hereinafter provided, form a corporation not organized for pecuniary profit for the purpose of promoting and encouraging the fullest possible use of electric energy in the rural section of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management of the business of such corporations. (1935, c. 291, s. 5.)

§ 117-19. Taxes and assessments.

(a) From and after April 20, 1965, no electric membership corporation heretofore or hereafter organized,

reorganized, or domesticated under the provisions of this Chapter shall be a public agency; nor shall any such corporation be, or have the rights of, a political subdivision of the State.

(b) With respect to its properties owned and revenues received on and after January 1, 1967, each electric membership corporation operating within the State shall be subject to, and shall pay taxes and assessments under, all laws relative to State, county, municipal and other local taxes and assessments applicable to the electric light and power companies in this State, except income tax.

(c) Each electric membership corporation operating in this State shall, on all of its properties located within any incorporated city or town, pay in lieu of taxes to such cities and towns and to the counties in which such cities and towns are located, amounts equal for 1965 to fifty percent (50%), and equal for 1966 to one hundred percent (100%), of the ad valorem property taxes that would be paid on such properties if such properties were owned by persons fully subject to such taxes.

(d) For the privilege of engaging in business in one or more incorporated cities or towns for the period beginning May 1, 1965, and ending December 31, 1966, or any part of such period, an electric membership corporation shall pay to the State an amount equal to six percent (6%) of its gross receipts received within such period from the business of furnishing electricity to or within all such cities and towns, less, however, six percent (6%) of such amount as such electric membership corporation has paid with respect to such sales to any public utility which pays a six percent (6%) franchise tax to the State on its wholesale sales of electricity to such electric membership corporation. The reporting, payment, and collection provisions of G.S. 105-116 shall apply to the levy herein made. The State shall remit to such cities and towns the same proportion of such payments, and in the

same manner, as is provided in G.S. 105-116 with respect to taxes paid by electric light and power companies.

(e) Except as provided in subsections (c) and (d) of this section, no electric membership corporation shall be subject during the years 1965 and 1966 to any tax levied by Chapter 105 of the General Statutes except those taxes to which it was subject on December 31, 1964. (1935, c. 291, s. 14; 1965, c. 287, s. 12.)